

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

William A. Newsom,
Plaintiff,

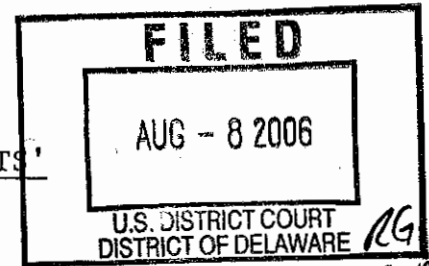
v.

Bureau Chief Paul Howard, et. al,
Defendants.

C.A. No. 05-673-GMS

Jury Trial Requested

PLAINTIFF'S RESPONSE TO STATE DEFENDANTS'
ANSWER TO THE COMPLAINT



Comes now the plaintiff, William A. Newsom, Pro Se, responding to the state defendants answer to his complaint, as well as responding to defendants affirmative defenses:

PLAINTIFF'S REQUEST FOR RELIEF

State defendants' alleged response to plaintiff's request is that the plaintiff is not entitled to compensatory, punitive, or any monetary damages.

Plaintiff now argues that he is entitled to compensatory, punitive, and other monetary relief pursuant to 42 U.S.C. sec.1997 e(e) for mental or emotional injury as well as pain and suffering where there was a prior showing of "physical injury".

"Physical Injury" was not clearly defined by Legislature under 42 U.S.C. 1997 e(e), however, in People v. Fields, 448 Mich. 58,67,528 N.W. 2d 176 (1995) - "Because legislature did not define "physical injury", This court must give those words their common, ordinary meanings". The 8th Amendment violation of deliberate indifference inflicted upon the plaintiff by the state defendants causing him physical harm and permanent injury due to their reckless or callous indifference violating his federally protected rights entitles him to compensatory damages (for physical harm suffered) and punitive damages (for the state defendants purposeful callous or reckless indifference). The harm that was suffered rises well above the De Minimis standards:

Hill v. Marshall, 962 F.2d 1209 (6th Cir. 1992)
Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991)
Marchese v. Lucas, 758 F. 2d 181 (6th Cir. 1985)
Smith v. Wade, 461 U.S. 30, 75 L.Ed. 2d 632, 103 S Ct. 1625 (1983)

PLAINTIFF'S RESPONSE TO STATE DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE- " Plaintiff has failed to state a claim upon which relief can be granted".

Plaintiff avers that the United States District Court for the District of Delaware has stated clearly in its order dated March 31, 2006 that, "The court has recognized and identified a cognizable 8th Amendment claims within the meaning of 28 U.S.C. § 1915 A(b) against state defendants Bureau Chief Paul Howard, Commisioner Stanley W. Taylor, Deputy Warden David Pierce, Captain Sagers and Security Superintendent Cunningham. It is presumed that the court has based this decision on the plaintiff's Prima Facie case and the numerous amounts of attached evidence to his complaint to support his claim.

SECOND AFFIRMATIVE DEFENSE- " Plaintiff has failed to exhaust his administrative remedies"

Plaintiff has attached copies of repeatedly filed grievances to his complaint to show his exhaustion of administrative remedies. The Department of Corrections failed to respond to the plaintiff's three grievances within the time allowed for a decision, Bowers v. mounet, 2001 WL at *2 (D.Del, July 18, 2001). While the plaintiff did not get a response in a timely matter through filing continuous grievances, he has satisfied the exhaustion requirement, Amaro v. Taylor F.Supp., 2001 WL 1346497(D. Del. 2001), Goode v. Correctional Medical Services, F.Supp. 2d, 2001 WL 1346500 at *2 (D. Del. 2001), and Long v. Lafko, 2001 WL 863422 at *2n. 1 (S.D.N.Y., July 31, 2001)- stating that, " If the prisoner documents "a reasonable attempt to exhaust " that is " deliberately disregarded or otherwise not responded

to", the court will deny a motion to dismiss". Above and beyond submitting grievances, when plaintiff was denied his right to be present at his formal Level II grievance hearing (right established by the institutions manual in 4.4 of grievance procedures) on September 14, 2004, which was almost a year after filing first grievance, his grievance was denied. Plaintiff filed an appeal dated September 17, 2004.

When plaintiff did not hear anything about his appeal, he filed a regular grievance on November 22, 2004 requesting an investigation as to why plaintiff was denied his right to be present at level II hearing, and why he never received a response to his appeal. Plaintiff received a response on December 8, 2004 stating that, "You have exceeded the time for filing, put in another sick call slip then grieve again if nothing happens". It appears at this point that plaintiff exhausted all of his administrative remedies due to his diligent efforts being thwarted by the correctional administration, Nitz v. French 2001 WL 747445 at *3 (N.D. Ill., July 2, 2001). The plaintiff further tried to exhaust administrative remedies through an informal process of sending letters to state officials and administrative members of the Department of Corrections. These letters were sent out between the dates of July 19, 2004 through September 22, 2004, complainig about the denial of proper medical treatment and requesting these individuals to investigate and intervene. In response to my letter to Governor Minner, she sent my information to Commisioner Stanley W. Taylor requesting him to take appropriate action. Nothing more was done. In response to my letter to Deputy Warden Burris, she asked Deputy Warden Pierce, Captain Sagers, and Security Superintendent Cunningham to investigate and take appropriate action. Nothing more was done. Plaintiff then sent a letter to Bureau Chief Paul Howard as a final appeal and plea for help. Bureau Chief Paul Howard never responded back. Plaintiff did all he could to exhaust his administrative remedies, Camp v. Brennan, 219 F. 3d 279 (3rd Cir. 2000), Noguera v. Hasty, 2000 WL 1011563 at * 11 (S.D.N.Y., July 21, 2000), and Prendergast v. Janecka, 2001 WL 793251 at *1 (E.D. Pa., July 10, 2001).

THIRD AFFIRMATIVE DEFENSE- "State defendants are immune from liabilty under the Eleventh Amendment".

State defendants are not immune from liability under the Eleventh Amendment based on the legal standard that, "suits against state officers in their individual capacities are not barred by the Eleventh Amendment", as well as, "supervisory officials sued in their individual capacity are answerable in a § 1983 action where there is casual connections between their own actions and the claimed civil rights violation", Medcalf v. State of Kansas, 626 F. Supp. 1179 (D. Kan. 1986). It is clearly stated that the plaintiff is suing the state defendants in their individual capacities.

FOURTH AFFIRMATIVE DEFENSE- "State defendants are entitled to qualified immunity".

State defendants are not entitled to qualified immunity while acting under the color of state law, and depriving the plaintiff of the right guaranteed by the Constitution or laws of the United States to necessary medical care while in custody, Gerakaris v. Champagne, 913 F. Supp. 646 (D. Mass. 1996).

Furthermore, the state defendants do not have the protection of qualified immunity when they knew or should have known that their actions violated clearly established law and deprived the plaintiff of his rights. Plaintiff relied upon prison authorities to treat his medical needs; when the state defendants failed to do so, his needs were not met, Estelle v. Gamble, 429 U.S. 97, 103, 97 S Ct. 285 (1976), and Hunt v. Uphoff, *supra* 199 F 3d at 1224- stating that, "Officials may be liable when a delay results in a lifelong handicap or permanent loss".

FIFTH AFFIRMATIVE DEFENSE)- "As to any claims under state law, state defendants are entitled to immunity under STATE TORT CLAIMS ACT, 10 Del. C. § 4001, et seq."

State defendants do not qualify for immunity under the STATE TORT CLAIMS ACT do to their reckless and callous acts that amounted to deliberate indifference, an action that violated plaintiff's constitutional rights, Estelle v. Gamble at 104-05, and Borreti v. Wiscomb, 930 F. 2d 1150, 1154-55 (6th Cir. 1991)- stating that, "A prisoner who suffers pain needlessly when relief

is readily available has a cause of action against those whose deliberate indifference is the cause of his suffering".

SIXTH AFFIRMATIVE DEFENSE- "As to any claims under state law, state defendants are entitled to sovereign immunity in their official capacity'

Plaintiff has brought a cognizable 8th Amendment claim against state defendants in their individual capacities acting under color of law. State defendants are not being sued in their official capacities, nor can they be considered a state entity with the privilege of sovereign immunity, Medcalf v. State of Kansas, 626 F. Supp. 1179 (D. Kan. 1986).

SEVENTH AFFIRMATIVE DEFENSE- "State defendants cannot be held liable in the absence of personal involvement for the alleged constitutional deprivation".

State defendants are held liable under the subjective component of their state of mind. State defendants were deliberately indifferent under a subjective standard when they knew of and disregarded an excessive risk to the plaintiff's health or safety, Farmer v. Brennan, supra 511 U.S. at 837. Furthermore, the plaintiff notified everybody from state officials to Department of Corrections administrative staff to let them know of the medical deprivation he was suffering, state defendants subjectively knew about the deprivation and refused to remedy it, Crowley v. Hedgepeth, 109 F. 3d 500, 502 (8th Cir. 1997).

EIGHTH AFFIRMATIVE DEFENSE- "To the extent that the plaintiff seeks to hold the state defendants liable based on supervisory responsibility, the doctrine of vicarious liability is not a basis for liability under 42 U.S.C § 1983".

State defendants as prison officials can be personally liable in this civil case for their actions in the course of their office. Plaintiff does not seek to hold state defendants vicariously liable for First Correctional Medicals misconduct, but rather, the state defendants had a job to do, and they did not do it. Their failure to do their job resulted directly in a violation of the plaintiff's 8th Amendment rights, Hill v. Marshall, 962

F. 2d 1209 (6th Cir. 1992). Although the Delaware Department of Corrections had contracted with a private medical contractor, the state defendants are still liable when the private medical provider did not provide adequate medical care and the state defendants had knowledge of that failure, West v. Atkins, supra 487 U.S. at 53, and Leach v. Shelby County Sheriff, supra 891 F 2d at 1250.

NINTH AFFIRMATIVE DEFENSE- "State defendants, in their official capacities are not liable for4 alleged violation of plaintiff's constitutional rights as they are not "persons" within the meaning of 42 U.S.C. § 1983".

State defendants are not being sued by the plaintiff in their official capacity. PLAINTIFF BROUGHT ACTION AGAINST DEFENDANTS IN THEIR INDIVIDUAL CAPACITY, Hafer v. Melo, 502 U.S. 21, 116 L. ed. 2d 301, 112 S Ct. 358 (1991)- stating that, "We hold that state officials, sued in their individual capacity are "persons" within the meaning of § 1983".

TENTH AFFIRMATIVE DEFENSE- "Insufficiency of service of process"

Persuent to Fed. R.Civ. P. 4(c)(2) and (d)(2), the plaintiff completed original "U.S. Marshall-285" forms for each of the defendants as wellas for the states attorney general. Plaintiff also provided the correct number of copies of the complaint for each defendant. Plaintiff followed all court rules and request for service of process.

ELEVENTH AFFIRMATIVE DEFENSE- "Insufficiency of process"

Plaintiff followed all request and directions of the court order regarding when and how the filing of complaint and service upon the defendants was to be done.

FINAL AFFIRMATIVE DEFENSE "Lack of jurisdiction over the person and subject matter"

Plaintiff brought his suit pursuant to 42 U.S.C. sec. 1983 because his constitutional rights were violated by individuals acting under the color of state law. Jurisdiction is based upon 28 U.S.C. sec. 1331 and 1343. The

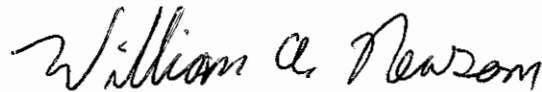
court also has supplemental jurisdiction over the state claims.

CONCLUSION

State defendants answer to plaintiff's complaint was without any response. Through plaintiff's whole complaint, the state defendants answer repeatedly stated that they "were without sufficient evidence to admit or deny any of the allegations set forth in the complaint". However, state defendants seek to have complaint dismissed on many affirmative defenses.

Wherefore, plaintiff William A. Newsom, Pro Se, request that the states request for judgement be denied. Plaintiff further request that judgement be awarded in his favor.

August 2, 2006



William A. Newsom
Delaware Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977

Certificate of Service

I, WILLIAM A. NEWSOM, hereby certify that I have served a true

And correct cop(ies) of the attached: PLAINTIFF'S RESPONSE TO STATE
DEFENDANTS' ANSWER TO THE COMPLAINT upon the following
parties/person (s):

TO: CLERK OF COURT

TO: _____

UNITED STATES DISTRICT COURT HOUSE

844 N. KING ST.

LOCK BOX 18

WILMINGTON, DELAWARE 19801

TO: EILEEN KELLY, DAG

TO: _____

CARVEL STATE OFFICE BUILDING

820 N. FRENCH ST., 6TH FLOOR

WILMINGTON, DELAWARE

19801

BY PLACING SAME IN A SEALED ENVELOPE, and depositing same in the United States Mail at the Delaware Correctional Center, Smyrna, DE 19977.

On this 2ND day of AUGUST, 2006

William A. Newsom

WILLIAM A. NEWSOM

SBI# 257317 UNIT V-BDG/B-3

DELAWARE CORRECTIONAL CENTER

1181 PADDOCK ROAD

SMYRNA, DELAWARE 19977

CLERK OF COURT

UNITED STATES DISTRICT COURT HOUSE

844 N. KING ST. Lock Box 18

WILMINGTON, DELAWARE

19801

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07 AUG 2006 PM

Three black and white photographs of the American flag, each with a '3908' label and a 'DO NOT WRITE' stamp.